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CONTRACTS TO REFRAIN FROM DOING BUSINESS OR FROM ENTERING OR CARRYING ON AN OCCUPATION

I

THE MERE CONTRACT TO REFRAIN FROM DOING BUSINESS, OR FROM ENTERING OR CARRYING ON AN OCCUPATION

IT was long ago assumed that a contract not to engage in a given business or occupation would be void where the promisor was already engaged in it, and the promisee was not and did not intend to be.[1]

The reasons alleged were: the disregard of the social interest in the freedom of individuals to enter whatever business they pleased; the mischief to the party by the loss of his livelihood and the subsistence of his family; the mischief to the public by depriving it of a useful member; and the tendency toward monopoly. The last would seem to be negligible. Today, such is the freedom and

[1] Mitchel *v.* Reynolds, 1 P. Wms. 181 [9].* (". . . for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare, that he would not follow it any more, etc., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work it again, and afterwards, when the necessities of his family, and the cries of his children, send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, though not his manner of expressing it.")

[*Numbers in brackets throughout Notes refer to pages in KALES, CASES ON CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE. — ED.]

ease of transportation and of entering other occupations and businesses that the danger of the loss of livelihood and subsistence for a family is not such as to cause great concern. The same changes make it less likely than formerly that the public will feel the loss of the service of any of its members.[2] But the social interest in all being free to enter whatever business they please is still so far operative that the mere contract to refrain from carrying on a business or occupation will be void.

This last consideration would, it is believed, be sufficient to invalidate the contract even though the promisor had not at the time of his promise entered any business or occupation at all, and was not contemplating doing so.

The above conclusions presuppose the fact that the business is one which the public is interested in having carried on. If the business or occupation is one which, while lawful, is regarded as contrary to the public interest, such as the liquor business, it has been held that the mere contract to refrain from entering or carrying on such a business is valid.[3]

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[2] Herreshoff *v.* Boutineau, 17 R. I. 3, 6, 19 Atl. 712 (quotation given *post*, note 13). But see Kellogg *v.* Larkin, 3 Pinn. (Wis.) 123 [151]. ("The loss to society of a valuable member is as great a public injury now as it ever was, and as great here as anywhere. I hope, indeed, that the market value of a human being is higher now than it was in England at the beginning of the eighteenth century, when the case of Mitchel *v.* Reynolds was decided. The capacity of an individual to produce [using that word in its largest sense] constitutes his value to the public. That branch of industry in which a man has been educated, and to which he is accustomed, and for the abandonment of which he demands compensation, is supposed to be the one in which he can render the greatest profit. The value of what he produces belongs to himself. The actual product belongs immediately to him who employs him, but mediately to the state, and goes to swell the aggregate of public wealth. Therefore, the law says to each and every tradesman: You shall not, for a present sum in hand, alien your right to pursue that calling by which you can produce the most and add the most to the public wealth, and compel yourself to a life of supineness and inaction, or to labor in some department less profitable to the state. And if any man, mindful of his own gain alone, but not of the public good, will bargain with you to that effect you are held discharged from such bargain because of the advantage that will arise to the public from so holding.")

[3] Harrison *v.* Lockhart, 25 Ind. 112; McAlister *v.* Howell, 42 Ind. 15.

II

Restrictive Covenants Accompanying the Promisor's Entry into an Apprenticeship Arrangement, or made upon his Entry into the Service of the Promisee for the Purpose of Learning a Trade or Business

We have the following possible considerations against the validity of such covenants: The social interest in the freedom of individuals to enter what business they please is violated. The contract tends to deprive the promisor of his livelihood, the public of a useful member, and to eliminate competition between the promisor and the promisee. On the other side we have the desirability of permitting the teaching of apprentices or employees by masters. This involves providing the means whereby they may obtain their instruction on the best terms possible. The apprentice must purchase the instruction. Practically, the easiest way for him to do it is to give his services in part payment and a covenant not to compete in lieu of the balance. If the covenant not to compete is not allowed, the apprentice or employee must pay cash, on the basis that the master is training a competitor. The result would be poor instruction, and a price which an apprentice or employee would find difficulty in meeting. If the restriction is not broader than the business of the master, the apprentice would have a large territory in which to carry on the trade or business which he has learned; and other apprentices learning the same trade in other districts could come into the district of the master and there compete with him.

Upon a balancing of the interests, it is clear that where the restriction given by the apprentice or employee is not broader than the master's business, it is valid.[4]

Nor is it any objection to the restriction that it is to continue for the life of the covenantor, and hence may continue after the master has died or gone out of business.[5] The covenant is still an asset of the master's estate after he is dead, or when he sells his business or takes in a partner. Where he has abandoned his

[4] Rousillon *v.* Rousillon, 14 Ch. D. 351; Badische *v.* Schott, [1892] 3 Ch. 447; Machine Co. *v.* Morse, 103 Mass. 73; Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712.

[5] Hitchcock *v.* Coker, 6 A. & E. 438 [12].

business, equity would no longer give an injunction, and the damages at law would be nominal.

Formerly it was said that the consideration must be good and adequate, so as to make it a proper and useful contract.[6] The later view is that a legal consideration which is also of some value must be given. But apparently the court will not undertake to weigh the value of the consideration against what is given in order to determine its adequacy.[7]

Suppose, however, that a country-wide business should exact such restrictive covenants of all employees entering business, or of all persons entering the business in any executive capacity, so that they would have no choice but to stay or change their occupation completely. Would not the balance of considerations be against supporting the validity of such arrangements? Here the loss of a livelihood might be a reality. The public might in fact be deprived of a useful member. The tendency toward monopoly might become decisive. The hiring in such a business is not really for the purpose of training men to go out and conduct a similar business, but rather with the object of keeping them permanently. A restriction, then, upon their going into any other similar business could hardly be regarded as a part of the price for teaching them. Rather must it be looked upon as a method of hampering the employer's competitors. Hence, such wholesale restrictions would

[6] Mitchel *v.* Reynolds, 1 P. Wms. 181 [4]. ("Particular restraints are either, first, without consideration, all which are void by what sort of contract soever created. 2 H. 5. 5. Moor, 115, 242; 2 Leon. 210; Cro. Eliz. 872; Noy, 98; Owen, 143; 2 Keb. 377; March, 191; Show. 2 (not well reported); 2 Saund. 156. "Or secondly, particular restraints are with consideration: "Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good.")

[7] Hitchcock *v.* Coker, 6 A. & E. 438 [26]. ("But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court, in every particular case, which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another; and the same may be observed as to other considerations. It is enough, as it appears to us, that there actually is a consideration for the bargain; and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary.")

point to a monopoly purpose, both in regard to the business and with respect to securing the use of the labor of certain individuals.

III

Restrictive Covenants Accompanying the Sale of a Business, which Sale, however, is not made to a Competitor

If the restriction is not broader than the business sold and is operative over a territory less than that of any state where the restriction applies, it is valid.[8] The restriction is an essential part of any complete sale of the business. The social interest in the freedom of individuals to sell at the best price obtainable [9] balances

[8] Bowser *v.* Bliss, 7 Black (U. S.) 344; National Enameling & Stamping Co. *v.* Haberman, 120 Fed. 415; Holbrook *v.* Waters, 9 How. Pr. (N. Y.) 335; Weller *v.* Hersee, 10 Hun (N. Y.) 431; Hursen *v.* Gavin, 162 Ill. 377, 42 N. E. 735; Duffy *v.* Shockey, 11 Ind. 70; Whitney *v.* Slayton, 40 Me. 224; Doty *v.* Martin, 32 Mich. 462; Dunlop *v.* Gregory, 10 N. Y. 241; Smith's Appeal, 113 Pa. St. 579, 590, 6 Atl. 251; Harkinson's Appeal, 78 Pa. St. 196; Oregon Steam Navigation Co. *v.* Winsor, 87 U. S. 64 (20 Wall.).

[9] Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419 [60]. ("It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammeled by unnecessary restrictions.") Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363 [69]. ("The object of government, as interpreted by the judges, was not to interfere with the free right of man to dispose of his property or of his labor.") Wood *v.* Whitehead Bros. Co., 165 N. Y. 545 [76]. ("In the present practically unlimited field of human enterprise there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business.") National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806 [96]. ("A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract.") United States Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946 [102]. ("In discussing this phase of the subject, we must not lose sight of some other principles, the disregard of which would be more harmful to public interest than monopolies. The right to contract is a cardinal element of constitutional liberty, and, as such, should be jealously guarded.") Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 105, 50 N. E. 509. ("The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its good will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old.") Smith's Appeal, 113 Pa. St. 579, 590, 6 Atl. 251. ("The principle is this: public policy requires that every man shall not be at liberty to deprive himself or the state of his labor, skill or talent, by any contract that he enters into. On the other hand, public policy requires that when a

any social interest in the freedom of individuals to enter what business they please.

Formerly it was urged against the restriction that the seller might become a charge upon the community because he could not carry on his trade or business.[10] This was at once met by the requirement that the seller must have received a substantial consideration for the sale of his business.[11] Recently, however, this requirement has been held to be satisfied if some consideration of value in addition to or including the consideration necessary to make a contract is given. The courts will not go into the adequacy of the consideration in each particular case, but will rely upon the seller obtaining, in general, the fair equivalent for the sale of his business.[12] Today, however, the fear of the seller becoming a charge

man has, by skill or by any other means, obtained something which he wants to so sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it, it is necessary that he should be able to preclude himself from entering into competition with the purchaser.") Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723 [165]. ("A tradesman, for example, who has engaged in a manufacturing business, and has purchased land, installed a plant, and acquired a trade connection and good will thereby, may sell his property and business, with its good will. It is of public interest that he shall be able to make such a sale at a fair price, and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold.") Kellogg *v.* Larkin, 3 Pinn. (Wis.) 123 [142].

[10] Mitchel *v.* Reynolds, 1 P. Wms. 181 [7]. ("The true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, first, the mischief which may arise from them, *first*, to the party, by the loss of his livelihood, and the subsistence of his family; *secondly*, to the public, by depriving it of a useful member.") Gamewell Fire-Alarm Co. *v.* Crane, 160 Mass. 50, 35 N. E. 98 [55]. ("To exclude a person from manufacturing or selling anywhere in the United States or in the world machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living.") Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419 [59]; Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363 [65]; Oakdale Manufacturing Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973 [78]; National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806 [96]; United States Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946 [102].

[11] Mitchel *v.* Reynolds, 1 P. Wms. 181 [4]. ("Particular restraints are either, *first*, without consideration, all which are void by what sort of contract soever created. . . . Or *secondly*, particular restraints are with consideration. Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good.")

[12] Hitchcock *v.* Coker, 6 A. & E. 438 [26]. ("But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he

upon the community has practically disappeared. If the business sold is small, the seller may take the consideration and start else-

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has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court, in every particular case, which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another; and the same may be observed as to other considerations. It is enough, as it appears to us, that there actually is *a* consideration for the bargain; and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary.") Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641, 649. ("In many of the early cases the language of the Courts would seem to imply that the adequacy or extent of the consideration had something to do with the validity of the contract. They say that a mere pecuniary consideration is not sufficient; that there must be something, although it does not appear very clearly what, added to this to support the contract. This idea, however, of the necessity of any greater or other consideration for a contract of this description, than any other, was obviously unfounded, and has been exploded by the recent cases. [Hitchcock *v.* Coker, 1 M. & G. 185; Green *v.* Price, 13 M. & W. 698.]") Duffy *v.* Shockey, 11 Ind. 70, 73. ("As to the question of the adequacy of the consideration, we are inclined to view this as we would any other contract made by parties capable of contracting. They should, in the absence of fraud, be presumed to have determined that point for themselves. . . . This presumption is peculiarly proper in this case, for the reason that we are left in doubt as to how much the consideration to be paid by the defendant was. In addition to the 300 dollars, he was to relieve the plaintiffs from their contracts with agents — to what amount we are not informed — he was to take the marble, carved or not, remaining after the completion of the outstanding contracts of plaintiffs. The value of the marble thus disposed of is not given. He was also to buy of plaintiffs marble at fixed prices; but whether those prices were advantageous to the plaintiffs, or defendant, we are not apprised by the pleadings or evidence.") Hubbard *v.* Miller, 27 Mich. 15, 25. ("The fact that complainant paid no more than the cost of the articles at Grand Haven can make no difference. Where a consideration recognized by law as being valuable is paid, the law very properly allows the parties to judge for themselves of the sufficiency in value of such consideration for their contracts. We cannot, therefore, enter into the question whether the consideration was commensurate in value with the restraint imposed. See Hitchcock *v.* Coker, 6 A. & E. 438; Pilkington *v.* Scott, 15 M. & W. 657; Hartley *v.* Cummings, 5 C. B. 247. And there is no reason for holding that, without the restraint contracted for, complainant would have been willing to purchase for the price he gave, nor can we say that the vendors could have sold at that price without such stipulation. In fact, we must infer that in their opinion they could not readily have done so without it, or they would not have given it. It is clear, at all events, that they thought the sale with the stipulation an advantageous one or they would not have made it. The contract must, therefore, be held fair, reasonable, and valid, unless too general and unlimited as to place, as insisted under the second objection.") See also Holbrook *v.* Waters, 9 How. Pr. (N. Y.) 335; Pierce *v.* Fuller, 8 Mass. 223 (a consideration of one dollar deemed sufficient to support the restrictive covenant).

In Chapin *v.* Brown, 83 Iowa 156, 48 N. W. 1074 [138], it would seem that the Court

where. If the business is so large that the restriction probably covers a wide area, the consideration paid to the seller will usually be such as to keep him from becoming a public charge.[13] Where the restriction is given by a corporation, the fear that the promisor will become a public charge has no place.[14]

regarded the evidence concerning the particular transaction as failing to show any adequate consideration. This can hardly be supported, because the recitals of the contract itself showed plainly that the seller was parting with a losing branch of his business without having it fall into the hands of those who competed with him in his other lines of business. The consideration was legally sufficient to make a contract, and it was a business transaction on its face in which a consideration of value was given for the restriction.

[13] Nordenfelt *v.* Maxim Nordenfelt Guns & Ammunition Co., [1894] A. C. 535 [33]. (The fact that the seller had become a pauper in the particular case made no difference.) Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 105, 50 N. E. 509. ("The changes in the methods of doing business and the increased freedom of communication which have come in recent years have very materially modified the view to be taken of particular contracts in reference to trade. The comparative ease with which one engaged in business can turn his energies to a new occupation, if he contracts to give up his old one, makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities which open the markets of the world to the merchants of every country leave little danger to the community from an agreement of an individual to cease to work in a particular field.") Herreshoff *v.* Boutineau, 17 R. I. 3, 6, 19 Atl. 712. ("In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an every-day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth; as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the State of the benefit of their industry. It would, therefore, be absurd, in the light of this common experience, now to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees, for a sufficient consideration, not to follow some one calling within the limits of a particular State. There is no expatriation in moving from one State to another; and from such removals a State would be likely to gain as many as it would lose.") Kellogg *v.* Larkin, 3 Pinn. (Wis.) 123]149]. ("The opportunities for employment are so abundant, and the demand for labor on all sides is so pressing and urgent and the supply so limited, that I much question, were we to consider the subject as *res integra*, if we should feel authorized to hold that a man had endangered his own livelihood and the subsistence of his family, by an agreement which merely excluded him from exercising the trade of a blacksmith or a shoemaker, leaving all the other departments of mechanical, agricultural, and commercial industry open to him.")

[14] United States Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946 [102]. ("Among the potent reasons first assigned against such contracts was that the person restrained by thus surrendering his chosen occupation — one for which he has been especially prepared — might become a public charge, and the public be injured in being deprived of his personal skill in the avocation to which he had been brought up. Such reasons cannot be applied to artificial persons without absurdity.")

Another ground formerly expressed for holding invalid these restrictive covenants was that they might leave a given community unserved by anyone capable of carrying on a given business.[15] This may have been an important consideration in the case of a business confined to a small territory at a time when others could not mobilize readily at a given point. It is out of place today, when the ease and freedom of transportation are such that if one man goes out of business in a given locality, there is little need to fear that the public will suffer by reason of the failure of anyone to serve it.[16] Besides, when a business is sold by one to another, the public is substantially as well off as it was before.

The tendency to monopoly by the elimination of competition is, in this class of cases, the slightest. No existing competition has been eliminated. One man has taken another's place. It is doubtful and entirely speculative whether the buyer would have competed if he could not have purchased. About all that can be said is that there is less probability that the purchaser would have competed if he could not have bought, than that the seller would compete if he had not entered into a restrictive covenant.[17]

If the restriction is not broader than the business sold, but

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[15] Mitchel *v.* Reynolds, 1 P. Wms. 181 [7], *ante*, note 10.

[16] Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419 [59]. ("He [Parker, C. J., in Mitchel *v.* Reynolds] refers to other reasons, *viz.*, the mischief which may arise (1) to the party by the loss by the obligor of his livelihood and the subsistence of his family, and (2) to the public by depriving it of a useful member, and by enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when Mitchel *v.* Reynolds was decided. Steam and electricity have for the purposes of trade and commerce almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the restless activity of mankind striving to better their condition, have greatly enlarged the field of human enterprise, and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor.") National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806 [96]. ("Moreover, as cheaper and more rapid facilities for travel and transportation gradually changed the manner of doing business, so as to enable parties to conduct it over a vastly greater territory than formerly, the Courts were necessarily compelled to readjust the test or standard of the reasonableness of restrictions as to place.")

[17] A restrictive covenant may be found to be expressed by interpretation from the sale of a business and good will, in which case the covenantor cannot hold himself out as carrying on his former business at a new address: Hall's Appeal, 60 Pa. St. 458.

The assignment by two out of three covenantees to the third of the business protected by the covenant, operates as an assignment of the covenant to the third, and he may release it to the covenantor: Gompers *v.* Rochester, 56 Pa. St. 194.

extends up to, or beyond the limits of any state where it is operative, it should still be held valid. The rational test is the extent of the business sold and not the boundaries of some political subdivision of the country. This is the view of the more recent cases, where the restriction has been held valid even when the sale was to a competitor.[18] The argument that such restrictions tend to force the promisor to leave the state is answered by the fact that this does not cause him to leave his country, and that what is lost by one man leaving the state is gained by others coming into the state.[19] The older decisions, for a time at least, appear to have made an arbitrary rule that a restriction which operated throughout a state was generally void even though not broader than the business sold.[20]

If the restriction is broader than the business sold, and the business sold is not coextensive with the boundaries of the United States, it is void.[21] The seller is doing more than sell what he has.

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[18] Nordenfelt *v.* Maxim Nordenfelt Guns Co., [1894] A. C. 535 [33]; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419 [55].

[19] Herreshoff *v.* Boutineau, 17 R. I. 3, 6, 19 Atl. 712. ("There is no expatriation in moving from one State to another; and from such removals a State would be likely to gain as many as it would lose.")

[20] Taylor *v.* Blanchard, 13 Allen (Mass.) 370; Lufkin Rule Co. *v.* Fringeli, 57 Ohio St. 596, 49 N. E. 1030. (Both of these cases involve sales to competitors, but no suggestion has been made that the rule of these cases was limited to the case of a sale to a competitor.) Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 50 N. E. 509, where the restriction accompanied a combination of competitors, seems *contra* to Taylor *v.* Blanchard, *supra*.

[21] Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723 [161]; Bishop *v.* Palmer, 146 Mass. 469, 16 N. E. 299 [45]; Berlin Machine Works *v.* Perry, 71 Wis. 495, 38 N. W. 82; Alger *v.* Thacher, 19 Pick. 51; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641; Lange *v.* Work, 2 Ohio St. 519; Thomas *v.* Miles, 3 Ohio St. 274; Wiley *v.* Baumgardner, 97 Ind. 66.

A fortiori, it is illegal if, in addition to the restriction being broader than the business sold, the sale is to a competitor: Gamewell Fire-Alarm Co. *v.* Crane, 160 Mass. 50, 35 N. E. 98 [50]. (Sale of one out of fifteen competitors in the United States to another.)

In some cases the courts have not been careful to determine whether the restriction as to territory was broader than the actual extent of the seller's business or not: Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419 [55]; Gamewell Fire-Alarm Co. *v.* Crane, 160 Mass. 50, 35 N. E. 98 [54].

In Tode *v.* Gross, 127 N. Y. 480, 28 N. E. 469, where the business sold was dependent upon a secret process, which was also sold, no inquiry seems to have been made as to whether the covenant (which was unlimited) was broader than the business sold.

But in Watertown Thermometer Co. *v.* Pool, 51 Hun (N. Y.) 157, the court seems

He is selling a business in which he might engage in the future. The public policy, therefore, in favor of his being permitted to sell what he has, freely and at the best price, is not applicable. The social interest in freedom of individuals to enter what business they please is not balanced by any social interest in freedom to sell at the best price obtainable. It may be that today there is little danger that the seller will become a charge on the community;[22] but that the public may be deprived of the benefit of his entering the business, and that a possible competitor may be eliminated, constitute an appreciable danger.[23] It has even been suggested that the fact that the restriction is broader than the business sold gives rise to the inference that it is exacted for the actual purpose of monopoly;[24] but this seems hardly so today.

The restriction may be broader than the business sold, because it relates to a territorial area larger than that in which the business was carried on,[25] or because it concerns a related business which was not actually carried on by the seller.[26]

When a professional man sells his practice and covenants not to carry it on in the place in question for the remainder of his

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to have sustained a restrictive covenant which was broader than the business sold, going upon the reasonableness of the advantage of the vendee.

[22] But see Gamewell Fire-Alarm Co. *v.* Crane, 160 Mass. 50, 35 N. E. 98 [55]. ("To exclude a person from manufacturing or selling anywhere in the United States or in the world machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living.")

[23] Bishop *v.* Palmer, 146 Mass. 469, 16 N. E. 299 [48]. ("Two principal grounds on which such contracts are held to be void are that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly.") Gamewell Fire-Alarm Co. *v.* Crane, 160 Mass. 50, 35 N. E. 98 [55]. ("The principal object of the stipulation was, we think, to prevent the manufacture or sale by the defendant of any instruments which would serve the same purpose as those made and sold by the plaintiff, and thus to enable the plaintiff more completely to control the market.")

[24] Mitchel *v.* Reynolds, 1 P. Wms. 181 [9]. ("It shows why a contract not to trade in any part of England, though with consideration, is void, for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, though it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime.")

[25] Bishop *v.* Palmer, 146 Mass. 469, 16 N. E. 299 [45].

[26] Gamewell Fire-Alarm Co. *v.* Crane, 160 Mass. 50, 35 N. E. 98 [50]. (The seller, who was a manufacturer, covenanted not to carry on the business of manufacturing or selling, and not to enter into competition with the buyer, either directly or indirectly.) [16]; *per* Van Fleet, V. C., in Mandeville *v.* Harman, 42 N. J. Eq. 185, 193, 7 Atl. 37 [32, note 9].

life, it has been argued that the restriction is broader than the necessities of the case require, since it would still be in operation if the buyer abandoned practice or died in the lifetime of the seller.[27] The reply is that just as the seller has sold his practice to the buyer, so the buyer may again sell his practice to another buyer or take in a partner.[28] Even if the first buyer dies in the lifetime of the seller, the fact that he had a practice protected from the seller's competition may make his practice an asset which his administrator can sell.[29] Furthermore, the buyer purchased the seller's practice, which means the practice which the seller could do during his life. It would hamper such transactions too much if the covenant had to be worded so as to take care of all the contingencies under which the restriction might cease to be of value to the buyer.

Covenants which seem to be broader than the seller's business may be divisible, so that the separable part which is not broader than the seller's business may be enforced.[30]

If the business sold is coextensive with the boundaries of the United States, but the restriction is world-wide, is it valid? It

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[27] *Per* Denman, C. S., in Hitchcock *v.* Coker, 6 A. & E. 438.

[28] French *v.* Parker, 16 R. I. 219, 14 Atl. 870 [29]. ("If the complainant here wished to retire from his practice and sell it, he could probably sell it for more if he would secure the purchaser from competition with the defendant forever, than he could if he could only secure him from such competition during his own life. So, if he wished to take in a partner, he could, for the same reason, make better terms with him.")

[29] Hitchcock *v.* Coker, 6 A. & E. 438 [12].

[30] Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723 [161]. (Restriction applied "within any state in the United States of America, or within the District of Columbia, except in the State of Nevada and the Territory of Arizona," and was held applicable to the area of each State disjunctively described, and enforced in the State where the covenantor's business was carried on); Smith's Appeal, 113 Pa. St. 579, 590, 6 Atl. 251 (restriction "in the County of Lehigh or elsewhere"); Thomas *v.* Miles, 3 Ohio St. 274 (restriction in "said city or elsewhere"); Lange *v.* Work, 2 Ohio St. 519 (restriction in "the County of Hamilton, in the State of Ohio, or any other place in the United States." Held valid as to Hamilton County); Wiley *v.* Baumgardner, 97 Ind. 66.

In Oregon Steam Navigation Co. *v.* Winsor, 87 U. S. 64, the restriction was held divisible as to the time it was to be operative. It was enforced during the time it could properly be operative. *Sed quaere ad hoc.*

In Hubbard *v.* Miller, 27 Mich. 15, a covenant not to carry on a certain business was, without any express limitation as to territory, construed as forbidding the carrying on of the business only at the city where the business sold had been carried on, and such territory round about as the business would naturally and reasonably be carried on in.

has been said that where the restriction related to the territorial area of a foreign country, that fact could not be an argument against the validity of the covenant.[31] This may be doubted; for it is now apparent that restrictions upon doing business in a foreign country may have a very unfortunate effect upon the public interest in the domestic jurisdiction — especially where the covenantee is engaged in a rival business in the foreign country as well as in the domestic jurisdiction.

IV

Restrictive Covenants Accompanying the Sale of a Business to an Existing Competitor, where the Restriction is so far Limited as to be Valid if the Sale were not to a Competitor

If the sale be illegal,[32] then the restriction certainly is. But if the sale taken by itself be legal, the courts have made no distinction, so far as the legality of the restriction is concerned, between the case where the sale is to a competitor and where it is not. Accordingly, the restrictive covenant and the sale to a competitor have been sustained both where the title to tangible assets used in the business passed,[33] and also where there were no such

[31] Nordenfelt *v.* Maxim Nordenfelt Guns Co., [1894] A. C. 535 [44]. ("The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.")

[32] As to the principles governing the validity of the sale, see Kales, "Good and Bad Trusts," 30 Harv. L. Rev. 830, which deals with combinations.

[33] Nordenfelt *v.* Maxim Nordenfelt Guns Co., [1894] A. C. 535 [33]; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419 [55]; United States Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946 [98]; Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723 [161]; Kellogg *v.* Larkin, 3 Pinn. (Wis.) 123 (1851); Chappel *v.* Brockway, 21 Wend. (N. Y.) 157 (1839); Van Marter *v.* Babcock, 23 Barb. (N. Y.) 633 (1857); Moore & Handley Hardware Co. *v.* Towers Hardware Co. 87 Ala. 206, 6 So. 41 (1888); Beard *v.* Dennis, 6 Ind. 200 (1855); California Steam Navigation Co. *v.* Wright, 6 Cal. 258 (1856); Hubbard *v.* Miller, 27 Mich. 15 (1873). But see, *semble*,

assets, and the only way in which the business could be sold was for the seller to agree not to carry it on.[34] Where part of a business has been sold to a competitor by merely covenanting not to carry on the part specified, the sale and the restriction have been sustained.[35]

In some cases there were special elements which furnished arguments in favor of the validity of the sale and the restriction. Thus where it appeared that the competitor who sold out had recently gone into the business for the purpose of engaging in a cut-throat competition and being bought off, there was presented an actual case of excessive competition, and the buyer was in the position of endeavoring to protect his legitimate and established business from the seller's unconscionable conduct.[36] So where it appeared that the seller was making tartar of both rock and bone, and that both were of equal utility, and the seller parted with his bone tartar business only and kept his rock tartar business, the court noted that the public purchasing tartar still had competition as to prices between rock tartar and bone tartar.[37]

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contra, Gamewell Fire-Alarm Co. *v.* Crane, 160 Mass. 50; 35 N. E. 98 [50]; Carroll *v.* Giles, 30 S. C. 412.

[34] Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363 [65]; Wood *v.* Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357 [72]; Wickens *v.* Evans, 3 Y. & J. 318, [84]; National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806 [94]; Mapes *v.* Metcalf, 10 N. D. 601.

[35] Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363 [65]; Wickens *v.* Evans, 3 Y. & J. 318 [84]; National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806 [94].

[36] Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363 [65]; United States Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946 [98], *semble*. (The court noted that the seller sold only part of its tartar business, so that it had been in a particularly advantageous position to cut prices in that part of the business sold, while making a profit on the other part, thus practicing the scheme of local price cutting to put the buyer out of business. The court speaks of the seller as being a dangerous and aggressive rival. The court said: "The plaintiff was making inroads upon the defendant's business, and greatly cutting the prices of its sole manufactured product, while with the plaintiff this product was but a single feature of its manufacturing plant. The defendant had a perfect right to buy off the competition of a dangerous, powerful, and aggressive rival. The law of self-defense and protection applies to one's business as well as to his person.")

[37] United States Chemical Co. *v.* Provident Chemical Co., 64 Fed. 946 [98].

V

RESTRICTIVE COVENANTS ACCOMPANYING THE COMBINATION OF SEVERAL BUSINESS UNITS

If the combination be illegal,[38] then the restriction certainly is. But if the combination taken by itself be legal, the courts appear to have made no distinction, so far as the validity of the restriction is concerned, between the case of a sale and a combination.[39]

The principal question which arises is whether the test of the validity of the restriction is the extent of the business sold or of the businesses combined. Is the restriction void only if it is broader than the business sold or only if it is broader than the businesses combined? The latter position has been sustained.[40] The situation is like that of an incoming partner, who devotes himself to the common business of all the partners, and may properly be restricted so that he cannot carry on the same business in competition with the partnership.

VI

COVENANTS NOT TO CARRY ON A BUSINESS GIVEN BY ONE IN THE BUSINESS TO ANOTHER IN THE BUSINESS OR INTENDING TO ENTER IT

It has already been assumed that a contract to refrain from doing business is void when the promisor is already engaged in the business and the promisee is not entering the business and not a competitor. On the other hand, some covenants not to carry on a business are valid when they are secured to enable the promisee to enter the business on more advantageous terms. A common case of this sort is where a professional man, having an established

[38] For the principles applicable in determining the validity of combinations, see Kales, "Good and Bad Trusts," 30 HARV. L. REV. 839.

[39] Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973 [78]; Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 50 N. E. 509; Robinson *v.* Suburban Brick Co., 127 Fed. 804.

[40] Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973 [84]. ("The circumstances show that it [the restrictive covenant] was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products.") Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, 50 N. E. 509. But see Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666, 690.

practice, covenants with one intending to practice in the same place that he will not longer carry on his profession there. Here the only sale of the covenantor's business is contained in the restrictive covenant not to carry it on. Its validity, however, is beyond question. Suppose, however, the promisee and promisor are already in the business and competing, is the covenant by one to the other to cease business valid?

Where the business is carried on principally with a plant and property which cannot readily be converted to any other use, and will in all probability lie entirely idle during a period provided by the covenant, the restriction is regularly held to be illegal.[41] The moment, however, the restrictive covenant is to take a steamboat off a certain run (which does not in the least involve keeping it idle but only transferring it to another service), it has been sustained.[42] So where competitors agreed to cease competing by dividing the territory where their selling force operated, and reciprocally covenanting not to do business in the specified territory of each other, the covenants have been sustained.[43] So where the business was conducted without any plant at all, the promise to cease business and turn over all orders to the competing promisee was held to be valid.[44]

[41] Tuscaloosa Ice Mfg. Co. *v.* Williams, 127 Ala. 110, 28 So. 669 [176]; Clemons *v.* Meadows, 123 Ky. 178, 94 S. W. 13 [185]. (There was in these two cases the added fact that a demand existed for the full product of the plants shut down.) Western Woodenware Ass'n *v.* Starkey, 84 Mich. 76, 47 N. W. 604 [189]. (Here it made no difference that some of the property used in the business, such as tools and equipment, was sold.) See also Oliver *v.* Gilmore, 52 Fed. 562. (Here it made no difference that the promisor had given a lease to the promisee for the term of the restriction.)

In Lufkin Rule Co. *v.* Fringeli, 57 Ohio St. 596, 49 N. E. 1030, it is suggested that even a sale with a restriction on the seller may be invalid where it is in reality an attempt to purchase another out of business. *Sed quaere ad hoc.*

[42] Leslie *v.* Lorillard, 110 N. Y. 510, 16 N. E. 363 [65]. (In this case there were the additional facts in support of the covenant that competition was excessive and was entered into by the covenantor — a newcomer in the business — for the purpose of compelling the promisee — the established line — to buy him off.)

[43] Wickens *v.* Evans, 3 Y. & J. 318 [84]; National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272, 47 N. W. 806 [94].

Similarly, where the covenantor and covenantee each engaged in the manufacture of peppermint oil and the covenantor was also engaged in raising peppermint roots, there was no objection to a division of the business, so that the covenantor, as part of the sale of his roots, covenanted not to do any manufacturing for a period of time: Van Marter *v.* Babcock, 23 Barb. (N. Y.) 633.

[44] Wood *v.* Whitehead Bros. Co., 165 N. Y. 542, 59 N. E. 357 [72]. In Mapes *v.* Metcalf, 10 N. D. 601, 88 N. W. 713, where the promisor was a printer and using a

In looking over these results one is forced to the conclusion that the mere covenant with the competitor not to carry on a given business is specially objectionable where it involves the shutting down and standing idle of a valuable plant, rendering the property useless for the time being. A contract operating in this way presents a distinctive feature which must be considered in balancing the considerations for and against its validity. This distinctive feature is decisive against the legality of the restriction even though the latter be regarded as a method of selling the business of the covenantor.

It may be urged that the covenantee could have purchased the property and then shut up the plant and yet the restriction by the seller must have been held valid. The answer to this is that the actual purchase of the plant and property would in most cases be a guaranty that the plant would not be shut down unless there had in fact been excessive competition — in which case the shutting down would be justified. Furthermore, a plant which is simply shut down for a specified number of years must (if the contract be valid) remain shut no matter what the business conditions may be. On the other hand, a plant and property which are purchased outright and shut down may, and undoubtedly would be, opened by the owner as soon as business conditions warranted that step. These considerations are sufficient to justify the courts in making a distinction between the actual sale of the plant and the shutting down of the plant without such sale.[45]

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plant in his business, but where the plant was not sold, the restriction was, nevertheless, sustained.

[45] In Stines *v.* Dorman, 25 Ohio St. 580, D. purchased of B. a hotel property. D. also sold to B. a hotel property, and B. covenanted not to use the premises so purchased for hotel purposes while the property which D. purchased from B. was so used. The restriction was held valid. Suppose, however, it had appeared that this was a mere subterfuge to secure in effect a covenant by B. to shut down his hotel property and go out of the hotel business while still retaining a property useful for hotel purposes? Perhaps the restriction might still have been sustained, because it was probable that under it B.'s property would not remain entirely useless but would be put to some other useful purpose.